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1963

# Harold Burleigh v. Warden John W. Turner : Brief of Appellant

Utah Supreme Court

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A. Pratt Kesler; Homer F. Wilkinson; Attorneys for Respondent;  
Harold Burleigh; Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

NOV 5 - 1963

HAROLD BURLEIGH,

Plaintiff and Appellant.

vs.

WARDEN JOHN W. TURNER,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No.  
10007

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BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT OF THE  
FOURTH DISTRICT COURT FOR UTAH COUNTY  
HON. R. L. TUCKETT, JUDGE

A. PRATT KESLER  
Attorney General

HOMER F. WILKINSON  
Ass't. Atty. General

Attorneys for Respondent

HAROLD BURLEIGH  
Appellant,  
Prep. Per.  
Utah State Prison  
Box 250  
Draper, Utah

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### POINT I

APPELLANT'S PETITION FOR HABEAS CORPUS IN CASE NO. 26,601 WAS PROPERLY BEFORE COURT HEARING WRIT INASMUCH AS WHAT APPEARS TO BE A FAILURE TO APPEAL FROM DENIAL OF HABEAS CORPUS IN CASE NO. 134,055 WAS, IN FACT, NOT A FAILURE OF APPELLANT TO APPEAL BUT, RATHER, A FAILURE OF COUNSEL APPOINTED BY THE SUPREME COURT TO APPEAL AND PROTECT APPELLANT'S INTERESTS.

### POINT II

HABEAS CORPUS LIES TO SERVE LAW AND JUSTICE AND WHEN THE END RESULT OF HABEAS CORPUS FINDS INNOCENCE, NO STATE INTEREST IN THE ENFORCEMENT OF CRIMINAL JUSTICE OR PROCEDURE IS OFFENDED FOR, WHILE THE APPLICATION OF RES ADJUDICATA MAY HAVE SERVED THE LAW, FAILURE OF THE STATE TO REED THE TRUTH, HAVING FOUND IT, OFFENDS AND DEFEATS THE ENDS OF JUSTICE.

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## DISPOSITION IN LOWER COURT

September 4, 1963,  
appellant petitioned the Utah Supreme Court,  
Honorable F. Henri Henriod, Chief Justice,  
for the writ of habeas corpus, No. 9988.

September 16, 1963,  
defendant filed a return thereon and there-  
after, the Supreme Court remanded said writ  
to the District Court, Fourth Judicial Dis-  
trict, Honorable R. L. Tuckett, for hearing.

Civil No. 26,601  
came on for hearing in said court September  
17, 1963 and September 20, 1963. Order deny-  
ing writ was filed September 20, 1963, and  
there appear to be no Findings of Fact or  
Conclusions of Law in support of said denial.

Appellant filed  
Notice of Appeal on October 7, 1963.

## RELIEF SOUGHT ON APPEAL

Appellant contends  
the decision of the lower court should be re-  
versed and appellant be ordered discharged  
from custody.

## STATEMENT OF FACTS

November 6, 1959, appellant pleaded guilty to Issuing A Fictitious Check with intent to defraud Albertson's Food Center, Inc. and was sentenced to serve not less than one nor more than ten years in the Utah State Prison by the Honorable A. H. Ellett, Judge, District Court of the Third Judicial District in and for Salt Lake County, State of Utah. ( See Information, Judgment, Transcript of Proceedings, No. 16679.)

Subsequently, appellant petitioned the Third District Court, Honorable Joseph G. Jeppson, for the writ of habeas corpus, No. 134,055, said writ being heard on December 14, 1961 and on January 9, 1962, appellant contending therein that his plea of guilty to the charge of issuing a fictitious check with intent to defraud was induced by appellant's physical suffering and the precarious state of his health at the time of his arrest, said arrest resulting from an erroneous identification having been made of appellant by one Mrs. Gladys Neiser, an employee of Albertson's Food Center, Inc., said Mrs. Neiser having first erroneously identified appellant's



picture causing a warrant to be issued for his arrest and, subsequently, following his arrest, again identifying appellant in a police lineup. ( See Transcript of Proceedings, No. 134,055, December 14, 1961: TR. pp. 6-12 re state of health and re erroneous identification see Transcript of Proceedings, No. 134,055, December 14, 1961: TR. p. 14, 8-15; TR. p. 17, 5-14; TR. p. 17. 23-30; TR. p. 18, 1-29; TR. p. 23, 3-17 and Transcript of Proceedings, No. 134,055, January 9, 1962: Tr. pp. 60-64.)

January 30, 1962,  
the court entered Judgment, Findings of Fact and Conclusions of Law denying aforesaid writ. February 9, 1962, appellant filed Motion to Set Aside Findings of Fact and Conclusions of Law. Notice was served upon appellant February 13, 1962 that date set for hearing on motion to set aside was February 21, 1962. Appellant is without knowledge as to what disposition was made of Motion. No appeal was taken from denial of habeas corpus. ( See Judgment, Findings of Fact and Conclusions of Law, Motion to Set Aside Findings of Fact and Conclusions of Law and Notice, No. 134,055.)

September 4, 1963,

appellant, contending mistaken identity, petitioned the Utah Supreme Court for the writ of habeas corpus, No. 9988. September 16, 1963, defendant filed a return thereon. Thereafter, the Supreme Court remanded said writ to the District Court, Fourth Judicial District, Honorable R. L. Tuckett, for hearing. Said writ, No. 26,601, came on for hearing September 17, 1963 and September 20, 1963. Writ denied in Minute Order dated September 20, 1963. No Findings of Fact or Conclusions of Law filed. ( See Writ, No. 9988 and 26,601, Defendant's Return to Writ, Order of Supreme Court remanding writ to Fourth District, Minute Entry dated September 20, 1963, denying writ.)

October 7, 1963, appellant filed Notice of Appeal, Designation of Record on Appeal, Motion for Waiver of Bond and Affidavit of Impecuniosity. ( See Designation of Record.)

### STATEMENT OF POINTS

#### POINT I.

Appellant's petition for habeas corpus in Case No. 26,601 was properly before court hearing writ inasmuch as

what appears to be a failure to appeal from denial of habeas corpus in No. 134,055 was, in fact, not a failure of appellant to appeal but, rather, a failure of counsel appointed by the Supreme Court to appeal and protect appellant's interests.

## POINT II.

Habeas corpus lies to serve law and justice and when the end result of habeas corpus finds innocence, no legitimate State interest in the enforcement of criminal justice or procedure is offended for, while the application of res adjudicata may have served the law, failure of the State to heed the truth, having found it, offends and defeats the ends of justice.

## ARGUMENT

### POINT I.

APPELLANT'S PETITION FOR HABEAS CORPUS IN CASE NO. 26,601 WAS PROPERLY BEFORE COURT HEARING WRIT INASMUCH AS WHAT APPEARS TO BE A FAILURE TO APPEAL FROM DENIAL OF HABEAS CORPUS IN CASE NO. 134,055 WAS, IN FACT, NOT A FAILURE OF APPELLANT TO APPEAL BUT, RATHER, A FAILURE OF COUNSEL APPOINTED BY THE SUPREME COURT TO APPEAL AND PROTECT APPELLANT'S INTERESTS.

In Case No. 26,601, as grounds for dismissal, respondent pleaded that appellant's relief from denial of habeas corpus in Case No. 134,055, said denial ordered by the Honorable Joseph G. Jeppson on January 30, 1962, was to appeal from said judgment, which appellant failed to do and, therefore, appellant's petition for habeas corpus in Case No. 26,601 was not properly before the court.

Appellant submits that Case No. 26,601 was properly before the court for the reason that what appears to have been a failure of appellant to appeal in Case. No. 134,055 was, in fact, no failure of appellant to appeal but, rather, failure of counsel appointed by this Court to appeal and protect appellant's interests.

The fact is - and the whole record shows - that appellant made diligent and timely effort to appeal and the record of his diligence and this Court's assistance that his right to appeal would be preserved rests in the Clerk's File of this Court. The Clerk's File shows, as follows:

"

March 6, 1962

Jim Mitsunaga, Esq.  
Attorney at Law  
231 East 4th South  
Salt Lake City, Utah

Dear Mr. Mitsunaga:

Mr. Justice F. Henri  
Henriod received the enclosed request from  
Mr. Harold Burleigh who is now in the Utah  
State Prison, requesting him to appoint some-  
one to assist him in appealing from the denial  
of a writ of habeas corpus. ( Emphasis added.)

Mr. Justice Henriod direct-  
ed me to request you to look into this matter  
and see if anything can be done for Mr. Bur-  
leigh. Will you please advise if you are in  
a position to accept this appointment.

Yours very truly,

L. M. Cummings  
Clerk

LMC/r

Enclosures (2)

cc: Harold Burleigh

"

March 8, 1962

Jimi Mitsunaga, Esq.  
Attorney at Law  
105 Empire Building  
Salt Lake City, Utah

Dear Mr. Mitsunaga:

I have your letter of  
March 7 asking to be relieved of the appoint-  
ment of taking an appeal in a habeas corpus  
case for Harold Burleigh. ( Emphasis added.)

I have submitted your letter  
to Mr. Justice Henriod, and in view of the  
circumstances he has relieved you of this as-  
signment.

Yours very truly,

L. M. Cummings  
Clerk

LMC/r

cc: Harold Burleigh

"

"

March 8, 1962

Calvin E. Clark, Esq.  
Attorney at Law  
1006 Deseret Building  
Salt Lake City, Utah

Dear Mr. Clark:

Mr. Justice F. Henri Henriod received the enclosed request from Mr. Harold Burleigh, who is now in the Utah State Prison, requesting him to appoint someone to assist him in appealing from the denial of a writ of habeas corpus. ( Emphasis added.)

Mr. Justice Henriod directed me to request you to look into this matter and see if anything can be done for Mr. Burleigh. Will you please advise if you are in a position to accept this appointment.

Yours very truly,

L. M. Cummings  
Clerk

LMC:r

Enclosures

cc: Harold Burleigh

"

"

March 9, 1962

L. M. Cummings  
Clerk of the Supreme Court  
State Capitol Building  
Salt Lake City, Utah

Re: Harold Burleigh

Dear Mr. Cummings:

I received your letter this morning stating that Mr. Justice F. Henri Henriod had directed you to request me to look into the matter of appealing from the denial of a writ of habeas corpus for Mr. Harold Burleigh. This letter is pursuant to your request to advise you if I am in a position to accept this appointment. ( Emphasis added.)

I will be happy to accept this appointment, and next week I will go down to the District Court and review the file of Harold Burleigh for a possible appeal. ( Emphasis added.)

Yours very truly,

Calvin E. Clark  
CEC/CM Attorney at Law

cc: Justice F. Henri Henriod  
Harold Burleigh  
Gordon A. Madsen

"



"

March 30, 1962

Mr. Harold Burleigh  
Box 250  
Draper, Utah

Dear Mr. Burleigh:

Mr. Justice Henried handed me your letter to him of March 29, with directions to inform you that Mr. Calvin Clark, who was appointed to look into your matter, has accepted the appointment and I am sure he will take whatever action is necessary to protect your interests. ( Emphasis added.)

It is not necessary for Mr. Clark to call on you at the prison to look into this matter, but I am sure that if you have anything to communicate with him, he would be pleased to receive a letter from you.

Yours very truly,

LMC:r

L. M. Cummings  
Clerk

"

The foregoing file of correspondence between the parties concerned plainly submits that appellant was diligent and timely in his effort to appeal from the denial in Case. No. 134,055, contrary to respondent's claim. That no appeal was filed is no fault of appellant. Failure of counsel appointed by this Court to assist appellant denied appellant due process of law which, later, in Case No. 26,601, he sought to find a remedy.

## POINT II.

HABEAS CORPUS LIES TO SERVE LAW AND JUSTICE AND WHEN THE END RESULT OF HABEAS CORPUS FINDS INNOCENCE, NO LEGITIMATE STATE INTEREST IN THE ENFORCEMENT OF CRIMINAL JUSTICE OR PROCEDURE IS OFFENDED FOR, WHILE THE APPLICATION OF RES ADJUDICATA MAY HAVE SERVED THE LAW, FAILURE OF THE STATE TO HEED THE TRUTH, HAVING FOUND IT, OFFENDS AND DEFEATS THE ENDS OF JUSTICE.

Surely no fair-minded person will contend that one who has served four years in prison for a crime he did not commit ought nevertheless to languish in prison merely because previous attempts to prove his innocence resulted in failure. But such is the case before this Court for review today.

Appellant, on November 6, 1959, pleaded guilty to the charge of issuing a fictitious check with intent to defraud Albertson's Food Center, Inc., and was sentenced to serve not less than one nor more than ten years in the Utah State Prison where he presently still remains imprisoned. ( See Information and Judgment, No. 16679.)

Subsequently, he petitioned for habeas corpus in third District Court, Honorable Joseph G. Jeppson, contending that the precarious state of his health and physical suffering at the time of his arrest, plus the fact he had been erroneously identified, induced him to enter a plea of guilty despite his innocence of the offence charged. The writ came on for hearing on December 14, 1961 and on January 9, 1962. ( See Transcript of Proceedings, No. 134,055, December 14, 1961 and Transcript of Proceedings, No. 134,055, January 9, 1962.)

Evidence adduced at the aforesaid hearings was conclusive as to appellant's physical suffering and precarious state of health at the time of his arrest which, appellant contended, caused him to fear for his life and induced him to plead guilty to a

crime he did not commit. ( See Transcript of Proceedings, No. 134,055, December 14, 1961: TR. pp. 6-12.)

Evidence adduced at aforesaid hearings appears to be inconclusive as to the identity of the person who had, in fact, issued a fictitious check to one Mrs. Gladys Neiser, said Mrs. Neiser being the person who cashed said fictitious check while employed by Albertson's Food Center, Inc. ( See Transcript of Proceedings, No. 134, 055, December 14, 1961: TR. p. 13, 8-29; TR. p. 14, 8-29; TR. p. 17, 5-14; TR. p. 17, 23-30; TR. p. 18, 1-29; TR. p. 23, 3-17 and Transcript of Proceedings, No. 134,055, January 9, 1962: TR. pp.60-64; TR. pp. 64-72; TR. pp. 72-77.)

On January 30, 1962, judgment was entered denying aforesaid writ and the court filed findings of fact and conclusions of law. Appellant filed motion to set aside findings of fact and conclusions of law on February 9, 1962 and, on February 13, 1962, appellant received notice that hearing on motion to set aside findings of fact and conclusions of law was set for February 21, 1962. ( See Judgment, Findings of Fact and

Conclusions of Law, Motion to Set Aside Findings of Fact and Conclusions of Law, Notice, No. 134,055.)

In Case No. 26,601, as grounds for dismissal, respondent pleaded that the matters contained therein had been before the Honorable Joseph G. Jeppson of the Third District Court, and the question of appellant pleading guilty to the charge and the mistaken identity had been completely heard and determined, and now is res adjudicata. ( See Respondent's Answer, Third Defense, 1.)

Appellant, however, refutes absolutely respondent's contention that the matter of mistaken identity was completely heard and determined by inviting the attention of this Court to the evidence adduced September 20, 1963, before the Honorable R. L. Tuckett, Judge of the Fourth District Court hearing writ wherein the witness, aforesaid Mrs. Gladys Neiser, testified as follows:

Transcript of Proceedings, No. 26,601,  
September 20, 1963: TR. pp. 19-21.

Q. Will you state your name, please.

A. Gladys Neiser.

Q. Gladys Neiser? Your address?

A. 847 Arapahoe Avenue.

Q. Your occupation?

A. Checker at Albertson's, Second South and Fourth East.

Q. Were you working at Albertson's in the latter part of 1959?

A. Yes.

Q. Are you the person that accepted a check made out in the name of R. J. Monahan?

A. I accepted the check. I don't remember the name as now. But it was okeyed by the Assistant Manager.

Q. But the check was presented to you?

A. Yes, and I cashed it.

Q. Am I the person that presented that check to you, Mrs. Neiser?

MR. WILKINSON: I object to that as suggestive, leading and irrelevant.

THE COURT: She may answer.

Q. (By Mr. Burleigh) Will you please answer that question?

A. At the time I thought--I mean--

Q. What would you say now? That I am the man?

A. Well, no, because when I got the pictures a year or two later, the resemblance--there was a resemblance there.

Q. When you saw the pictures two years later. There was two pictures, mine and one other gentleman?

A. Yes.

Q. Is this right?

A. Yes.

Q. After seeing the two pictures, who did you decide it was that cashed that check? Was it me or Mr. Crane?

A. It was the other fellow.

Q. That cashed the check?

A. But there was such a resemblance. I was really shocked.

Q. If you were to pick the two out in a lineup right now, if you were told to pick out the two of us, which one would you pick?,

A. I am afraid I would pick the other fellow.

### CONCLUSION

Appellant submits that the foregoing testimony of Mrs. Gladys Neiser, at long last, completely and conclusively exonerates appellant of being the person who issued a fictitious check to Albertson's Food Center, Inc., which check Mrs. Neiser cashed. Mrs. Neiser, who previously erroneously identified appellant as being the person for whom she had cashed a fictitious check, now retracts her previous identification and plainly states that appellant is not the person for whom she cashed the check. It can no longer be questioned that she is uncertain

- in her exoneration of appellant.

Appellant submits that the writ of habeas corpus lies where there is mistake in identity - i.e., where one person is wrongfully imprisoned in lieu of another by reason of a mistake in identity. ( See Corpus Juris, Criminal Law, Sec't. 42.) Also:

Foster vs. Perry, 71 Fla. 155, 70 S 1007.

Moebus' Pet., 73 N.H. 350, 62 A 170.

Haggerty vs. People, 53 N.Y. 476, (rev 6 Lans, 332.)

People vs. Enright, 115 Misc. 206, 189 NYS 167.

Ex parte Ridley, 3 Okla. Cr. 350, 106 P 549, LRANS 110.

Respublica vs. Philadelphia Gaoler, 2 Yeates 258.

Appellant submits that habeas corpus lies to serve law and justice and when the end result of habeas corpus finds innocence - as here - no legitimate State interest in the enforcement of criminal justice or procedure is offended. Largely, it is true, appellant's predicament has been brought upon him by himself. But now the truth has been found and for the State to fail to heed the truth and insist that appellant remain impri-



-soned for a crime he did not commit, not only would justice be offended - but a mockery and travesty of justice would result.

Appellant respectfully contends that the appeal before this Court today stands on its own in that surely no just and humane legal system can tolerate a situation where an innocent person must remain in prison for a crime he did not commit merely because legal technicalities have closed all doors leading to a lawful release.

Appellant prays that this Court will search the record for the truth.

Respectfully submitted,

---

HAROLD BURLEIGH  
Plaintiff-Appellant  
Prop. Per.

Utah State Prison  
Box 250  
Draper, Utah